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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/711,629	09/29/2004	Thomas Menna	P04-15	5628
25759	7590	08/02/2006	EXAMINER	
JOHN J. ELNITSKI, JR. 225 A SNOWBIRD LANE BELLEFONTE, PA 16823			ANDREWS, DAVID L	
			ART UNIT	PAPER NUMBER
			3672	

DATE MAILED: 08/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/711,629

Applicant(s)

MENNA, THOMAS

Examiner

David Andrews

Art Unit

3672

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 6 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 September 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

### **DETAILED ACTION**

1. Claims 1-19 have been examined.

#### ***Drawings***

2. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description: top 46 of the extension tubing (paragraph 15, last line). Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

#### ***Claim Objections***

3. Claims 2 and 14 are objected to. In claim 2, reference is made to claim 2 within itself. It is assumed that "The hole digger of claim 2,..." should read "The hole digger of claim 1,..." and will be examined as such. Claim 14 is objected to because it contains the phrase "...said top ring," but no ring is named in the claims to which claim 14 is dependant on. Appropriate corrections are required.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-5, 7-8, 10-11, 14 and 19 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Zizak (US 3,638,741).

In regard to claim 1, Zizak discloses a hole digger, comprising: a handle end (20 in figure 1), a support section (12 in figure 1) and a digging end (70 in figure 1).

In regard to claim 2, Zizak discloses all the limitations of claim 1 as described above and also includes a vacuum attachment point (35 in figure 1 or 52 in figure 2).

In regard to claim 3, Zizak discloses all the limitations of claims 1 and 2 as described above and a support section that is open and receives an extension of vacuum tubing extending from the top handle end to the bottom digging end (50 in figure 1) and the other end extending to the handle end to act as a vacuum attachment point.

In regard to claim 4, Zizak discloses all the limitations of claim 1 as described above and also includes at least two sharpened prongs (70 in figure 1).

In regard to claim 5, Zizak discloses all the limitations of claims 1 and 4 as described above and further includes the sharpened prongs formed into a circle, where each comes to a point at a sharp angle into the ground (70 in figure 1).

In regard to claim 7, Zizak discloses all the limitations of claims 1 and 2 as described above and includes at least two sharpened prongs (70 in figure 1).

In regard to claim 8, Zizak discloses all the limitations of claims 1, 2, and 7 as described above and includes each sharpened prong having a bottom end which is sharp and comes to a point (70 in figure 1).

In regard to claim 10, Zizak discloses all the limitations of claims 1 and 2 as described above, including forming the plurality of sharpened prongs as a circle (70 in figure 1).

In regard to claim 11, Zizak discloses all the limitations of claims 1, 2, and 10 as described above, including each sharpened prong having a bottom end which is sharp and comes to a point (70 in figure 1).

In regard to claim 14, Zizak discloses all the limitations of claims 1, 2, and 3 as described above, and also includes two handles extending from the top.

In regard to claim 19, Zizak discloses all the limitations of claims 1 and 2 as described above, and also includes the support sections being an open ended cylinder having a top, a bottom and a center where the top of the cylinder is the vacuum attachment point (52 in figure 2).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 6, 9, and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zizak (US 3,638,741) as applied to claims 1-2, 4-5, 7-8 and 10 above, and further in view of Henderson (US 3,103,982).

In regard to claims 6, 9, and 12, Zizak discloses all the limitations of the digging device in claims 1, 2, 4, 5, 7, 8, 10 and 11 as described above, but does not teach that the sharp angle of the prongs runs from a point and angles towards an outside of the digger. Henderson, however, discloses a cylindrical digging device that does include a sharpened surface angled towards the outside of the digger (18 in figure 1). As Henderson notes (column 2, lines 53-55), a sharpened edge angled in such a manner provides a cutting edge for inserting into the ground surface, easing the use of the tool. Therefore, for the reason above, it would have been obvious to one of ordinary skill in the art, at the time of invention, to combine the digging tools of Zizak and Henderson.

6. Claims 13, and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zizak (US 3,638,741) as applied to claims 1-3 above, and further in view of Kosmalski (US 5,826,668) and Carcossa (US 6,231,270).

In regard to claim 13, Zizak discloses all the limitations of the digging device in claims 1, 2, and 3 as described above, as well as the use of a bottom ring with an open

center to connect the support and digging sections (16 in figure 3), but Zizak does not teach that the handle, support section and bottom sections are connected by rings, nor that the support section is made of legs extending between the rings with an open center. Carcosa, however, does teach a digging device where handle and support sections are connected by rings having an open center (18 in figure 1). If the support and handle sections are separate pieces, a connection between them is necessary and a ring structure is a simple and efficient attachment means. Kosmalski discloses a digging tool where the support section is made up of legs connecting the handle to the bottom section (18 in figure 1). The use of legs, rather than a fully enclosed frame, would give the benefit of less material usage in the tool construction and a lighter weight tool.

In regard to claim 15, Zizak, Kosmalski and Carcosa disclose all the limitations of the digging device of claims 1, 2, 3, and 13 as described above. Zizak further discloses on his digging device at least two sharpened prongs extending from the bottom ring (70 in figure 1).

In regard to claim 16, Zizak, Kosmalski and Carcosa disclose all the limitations of the digging device of claims 1, 2, 3, 13, and 15 as described above. Zizak further discloses on his digging device each sharpened prong having a bottom end which is sharp and comes to a point (70 in figure 1).

In regard to claim 17, Zizak discloses all the limitations of claims 1, 2, and 3 as described above including a stop ring to hold the extension tubing in a position close to the ground (formed by 75 in figure 1). Zizak does not teach the use of an alignment

ring. Carcossa, however, does include the use of an alignment ring to hold the extension tubing (32, 34 in figure 1). An alignment ring would properly orient the tubing inside the device and stabilize the device.

In regard to claim 18, Zizak, Kosmalski and Carcoss disclose all the limitations of the digging device of claims 1, 2, 3, and 13 as described above. Zizak further includes the use of a stop ring to hold the extension tubing in a position close to the ground in the support section near the bottom ring (formed by 75 in figure 1). Zizak does not teach the use of an alignment ring. Carcoss, however, does include the use of an alignment ring to hold the extension tubing (32, 34 in figure 1). An alignment ring would properly orient the tubing inside the device and stabilize the device.

Therefore, for the reasons outlined above, it would have been obvious to one of ordinary skill in the art, at the time of invention, to combine the digging tool of Zizak with those of Kosmalski and Carcossa

### ***Conclusion***

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Batstone (US 2,802,689) discloses a cylindrical hand digging tool and Cagianut et al (US 5,535,836) disclose a digging tool with a vacuum attachment.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Andrews whose telephone number is (571) 272-6558. The examiner can normally be reached on Monday thru Friday, 8am-4pm.




If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Bagnell can be reached on (571) 272-6999. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

David Bagnell  
Supervisory Patent Examiner  
Art Unit 3672

DLA

  
William Neuder  
Primary Examiner